UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION at AKRON

IN RE FIRSTENERGY SOLUTIONS CORP., ET AL., **Debtors**	**Case No. 18-50757-AMK** **Chapter 11** **Honorable Alan M. Koschik, United States Bankruptcy Judge**
FIRSTENERGY SOLUTIONS CORP., **Plaintiff,** **V.** **BLUESTONE ENERGY SALES CORP.,** **Defendant.**	**Adversary Proceeding 18-5100**

MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS COUNT I OF THE ADVERSARY COMPLAINT

Defendant Bluestone Energy Sales Corp. ("Bluestone") respectfully moves the Court, pursuant to Fed. R. Bankr. P. 7012, to Dismiss Count I (Turnover of Estate Property pursuant to 11 U.S.C. § 542(a)-(b)) of the Adversary Complaint filed by Plaintiff FirstEnergy Solutions Corp. ("FES" or "Plaintiff") for failure to state a claim upon which relief can be granted. In support of this Motion, Bluestone respectfully states as follows:

INTRODUCTION

Count I of FES's Complaint purports to make a claim for turnover pursuant to 11 U.S.C. § 542(a)-(b). Specifically, FES seeks to require Bluestone to "turnover" the Final Payment (approximately $3,082,397.60) allegedly due under a Coal Purchase Agreement (the "Agreement") entered into by the parties on or about October 10, 2016. The problem with this

claim is that the "Final Payment" allegedly due is wholly disputed by Bluestone. As an alleged and disputed contractual obligation, the Final Payment is simply not property of the estate. Because FES can prove no set of facts that the Final Payment constitutes property of the estate, Count I fails to state a claim upon which relief can be granted.

FACTUAL BACKGROUND

I. THE MAY 1, 2016 COAL SALES "STOCKPILE" AGREEMENT

These parties have generally had an amicable relationship. More than once the parties entered into contracts regarding the sale of coal. In early 2016, Monongahela Power Company ("Monongahela"; an affiliate of FES) sought to obtain a backup source of coal for its use in power production. Ostensibly the backup source was desired because of fears of a labor-related interruption in the delivery of coal from Monongahela's primary supplier. Monongahela needed the coal ready to ship, but did not need or wish for the coal to be delivered to its facilities while still receiving coal from its primary supplier. Monongahela therefore negotiated with Bluestone for the latter to supply and sell coal to Monongahela, but to stockpile the coal at Bluestone's facilities for delivery in the event the coal was needed. Those negotiations resulted in the execution of the Coal Sales Agreement effective May 1, 2016 between Monongahela and Bluestone (the "Stockpile Agreement"), a copy of which is attached as Exhibit 1.

In general terms, the Stockpile Agreement called for Monongahela over time to purchase from Bluestone 750,000 weighed tons of cleaned coal. The coal was to meet certain defined quality benchmarks and was to be delivered and stockpiled "ratably," or in more or less equal increments spread out over the rest of 2016, or at the longest over one year. The coal was to be collected at a stockpile on Bluestone's property in Bent, Kentucky, near where it was mined. As the weighed and tested coal was added to the stockpile, Bluestone would send an invoice to

Monongahela for payment of the coal on a per-ton basis. The Stockpile Agreement expressly recognized Force Majeure, among other things, as a defense to payment.

Over the next few months after execution of the Stockpile Agreement, Bluestone delivered approximately 130,000 tons of coal to the stockpile in Bent, Kentucky. At some time during those months, Monongahela assigned its rights and duties under the Stockpile Agreement to FirstEnergy Generation, LLC ("Generation"). Either Monongahela or Generation paid Bluestone for the approximately 130,000 tons of coal that was delivered to the stockpile. As payments for the coal were made, Monongahela or Generation took title to the coal that was the subject of each payment.

II. THE SEPTEMBER 21, 2016 "TERMINATION" AGREEMENT

Shortly after execution of the Stockpile Agreement, the coal supply concerns or fears that lead to the negotiation and execution of that Agreement were alleviated, and Generation decided to terminate that Agreement early. Effective September 21, 2016, Generation and Bluestone entered into an Agreement To Terminate Coal Sales Agreement (the "Termination Agreement"; attached as Exhibit 2).

The general terms of the Termination Agreement were that Bluestone had no further duty to deliver any coal and that Generation had no further duty to purchase any coal from Bluestone. Furthermore, Generation agreed to pay Bluestone a "buyout" for the coal Bluestone had allocated to the Stockpile Agreement and was in the process of mining and/or delivering, approximately 619,000 tons. The Termination Agreement was silent on the disposition of approximately 130,000 tons of coal sold under the Stockpile Agreement which were sitting unused on Bluestone's property in Bent, Kentucky.

III. THE OCTOBER 10, 2016 COAL PURCHASE AGREEMENT

At some point in time Generation assigned its title to the stockpile of coal to its affiliate FES. FES then negotiated with Bluestone to dispose of the stockpile and those parties entered into a Coal Purchase Agreement effective October 10, 2016 (the "Purchase Agreement"; attached as Exhibit 3). That Agreement defined the "Purchased Tons" as those tons of coal which Generation purchased from Bluestone under the Stockpile Agreement referenced above, and then stated the parties' intent to sell that coal to Bluestone over time as Bluestone sold the coal to third parties.

In the Purchase Agreement, the parties stated that title to the stockpile of coal originally sold to Monongahela was to remain in the name of FES until paid for by Bluestone. As Bluestone used coal from the stockpile or sold it to third parties, it was to weigh the coal and then pay FES for that coal, per ton, on a weekly basis. The parties initially anticipated that it would take Bluestone through the end of February 2017 to use up (and resell to other buyers) all the coal in the stockpile. "If any Purchase Tons remain in the Stockpile as of February 28, 2017, then [Bluestone] shall pay FES for all such remaining Purchased Tons no later than March 7, 2017." Ex. 3, para. 2 (emphasis added).

The Purchase Agreement never stated a full or fixed amount due and owing from Bluestone to FES for the stockpile of coal, and only obligated Bluestone to pay for the actual tons of coal it removed from the stockpile plus any tons which actually remained in the stockpile, if any, after February 28, 2017. The Purchase Agreement once again recognized Force Majeure as a defense to payment.

IV. THE PARTIES' COURSE OF PERFORMANCE

Both before and after March 7, 2017 (the date of the allege breach), the parties to the Purchase Agreement behaved on a consistently less formal and more collegial nature than their formal written agreements would seem to require. The parties exchanged emails about the stockpile and payments related thereto, but seldom observed all the formalities. In particular, Bluestone more than once sent payment to FES for coal removed from the stockpile without simultaneous weight records or invoices for payment. See November 29, 2016 email from FES to Bluestone, attached as Exhibit 4. None of these variances from the formalities of the written agreements were alleged to be breaches of contract or other causes of action.

The parties also engaged in numerous telephonic conversations regarding performance under the Purchase Agreement, including conversations that dealt with when and if Bluestone owed any further amounts to FES after February 28, 2017. In those conversations and in related emails, the parties expressed their agreement that Bluestone would pay FES as coal from the stockpile was removed and sold, on a per-ton basis rather than a stockpile as a whole basis. See, e.g., June 2, 2017 message and related chain of emails between principals of Bluestone and FES, attached as Exhibit 5.

In the June 2, 2017 email, Bluestone's principal, Jay Justice, through the use of the phrase "get money moving again," expressed Bluestone's understanding of the parties' agreement—that Bluestone owed FES for purchased coal only upon Bluestone's subsequent resale of that coal. That understanding not only affected the timing of the payment for the coal, but also the raw tonnage of the coal when sold. The parties to the Purchase Agreement, all being familiar with the physical and saleable characteristics of coal, understood that coal that is handled, relocated, and stockpiled outdoors, particularly in wet or cold months or both, will

deteriorate and break down, causing loss of mass and BTUs. Stockpiling will also increase moisture content and thereby affect test results for ash and potentially for sulfur.[1] Given these realities, the parties understood and necessarily agreed that over time the mass and the value of the stockpile would shrink. The parties also necessarily understood and agreed that selling deteriorated stockpile coal would require its being washed and potentially blended with other coal. Overall, the parties therefore understood that in the winter months during which Bluestone was to remove and sell the stockpile, that it would not be possible to remove or sell the same number of tons of coal that were originally contributed to the stockpile. That is why the Purchase Agreement calls only for payment for the specific tons of coal that were removed from the stockpile, plus the tons of coal that remained, "if any." The Purchase Agreement did not simply seek a refund for the prior purchase of approximately 130,000 tons from Bluestone, as could have been the case if the parties had so desired and agreed. In fact, the Purchase Agreement did not seek any payment for tons of coal lost due to deterioration or dilution.

Although the records of Bluestone are still being reviewed by counsel to determine the full amounts and dates of payments made by Bluestone for coal removed from the stockpile, on information and belief there was no coal removed from the stockpile by or for Bluestone's benefit for which it did not fully compensate FES under the Purchase Agreement. Bluestone denies that any significant tons of coal remain in the stockpile and denies that any significant payment is due to FES for coal that was once in the stockpile. Bluestone specifically denies removing any coal from the stockpile and then not making an appropriate payment for that coal to FES. Specifically, Bluestone denies owing to FES the alleged amount of the "Final Payment"

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[1] See, e.g., Una Nowling, PE, "Who Moved My Btus?" The Pitfalls of Extended Coal Storage, available at https://www.powermag.com/who-moved-my-btus-the-pitfalls-of-extended-coal-storage/ (December 1, 2016), attached as Exhibit 6.

FES claims is due and owing, and it denies holding any property of the estate. In no event does Bluestone retain funds that it earned from sales of any coal that was once in the stockpile and for which no corresponding payment was made to FES.[2]

V. THE FES BANKRUPTCY SCHEDULES

On March 31, 2018, FES filed a Chapter 11 Voluntary Petition, commencing the above-styled main case. On May 15, 2018, FES filed its Statement of Financial Affairs and the Schedules to its Petition. Bluestone and its contracts with FES do not appear to be referenced in the Statement, and are mentioned only three times in the Schedules. On page 39 of the Schedules, FES lists a "Potential Litigation Claim" against Bluestone under item "Part 11, Question 74: Causes of action against third parties (whether or not a lawsuit has been filed)". [Doc 547, May 15, 2018, p. 39 of 162.] The amount requested and current value of the Debtor's interest are listed as "undetermined." Id. Bluestone is later listed among parties to be notified about unsecured claims, although Bluestone is not elsewhere listed as having any claim against FES. Id., p. 104. Lastly, Bluestone is listed in Schedule G as having an executory contract with FES, described as a "Power Supply Agreement, Dated: 10/10/2016" of "undetermined" remaining term. Id., p. 112.

FES does not list Bluestone as holding any property of the estate in its Schedules or Statement of Financial Affairs. Instead, Bluestone is said to be in a power supply contract with FES of undetermined term and a party against whom FES has a potential litigation claim of

[2] Bluestone has not formally answered the Adversary Complaint, but will plead consistent with this Motion and Memorandum unless new evidence is discovered. Bluestone reserves the right to assert all appropriate defenses, affirmative or otherwise, and the right to make any further motions for relief that may be made appropriate by the Court's rulings on this Motion.

undetermined value. FES does not appear to have attempted to reject or assume any contract with FES.

All the foregoing makes it clear that Bluestone is not holding any undisputed property of the estate. Instead, under the parties' Agreement FES held title to the coal until Bluestone paid the "Purchase Price." FES did not, however, list either the coal or the Final Payment sought in this Adversary Proceeding as a receivable in its schedules or anywhere in its Statement of Affairs. While FES did list a potential lawsuit against Bluestone, it claimed that the potential litigation was of unknown value.

ARGUMENT

I. RULE 12(b)(6) STANDARD.

Bluestone seeks dismissal of Count I of FES's Complaint (seeking turnover) for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).[3] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009) (quoting Bell v. Twombly, 550 U.S. 544, 570 (2007)). Stated differently, when faced with a motion to dismiss, the Court's task is to 'construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief.'" Morris v. Zelch (In re Reg'l Diagnostics, LLC), 372 B.R. 3, 27 (Bankr. N.D. Ohio 2007) (quoting Power & Tel. Supply Co. v. SunTrust Banks, Inc., 447 F.3d 923, 930 (6th Cir. 2006)). It follows that "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual

[3] Rule 12 of the Federal Rules of Civil Procedure is made applicable to adversary proceedings pursuant to Fed. R. Bankr. P. 7012(b).

enhancement.'" Id. (quoting Twombly, 550 U.S. at 555, 557). Similarly, the Court need not "accept as true legal conclusions or unwarranted factual inferences. In re Reg'l Diagnostics, LLC, supra, at 27 (citation omitted).

II. PLAINTIFF'S CLAIM FOR TURNOVER FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The turnover claim asserted in Count I of FES's Complaint fails to state a claim upon which relief can be granted because turnover actions under Section 542 are limited to recovery of assets that are undisputedly property of the bankruptcy estate. The Final Payment – the alleged contractual debt owed by Bluestone and disputed in its entirety – is not property of the estate and, therefore, is not the proper subject of FES's turnover claim.

A. Turnover Claims Only Apply To Property Of The Estate.

The Bankruptcy Code's "turnover" provision (Section 542) is captioned "Turnover of property to the estate" and provides, in relevant part:

> (a) . . . an entity . . . in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.
>
> (b) . . . an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

11 U.S.C. § 542(a)-(b).

Under Section 542(a), "turnover of property may be sought and obtained by what is in substance a federal right of replevin – a right to recover the estate's property in kind, with the ability to get the value of the property as a substitute." Bell v. Soundview Composite Ltd. (In re Soundview Elite Ltd.), 543 B.R. 78, 97 (Bankr. S.D.N.Y. 2016). Section 542(b), on the other

hand, "provides what is in substance a mechanism for monetizing a receivable that is property of the estate." Id.

Thus, a trustee, or a Chapter 11 debtor standing in the shoes of the trustee, may only seek the turnover of property when the property is subject to administration by the trustee (e.g., the trustee may use, sell, or lease the property under § 363) or the property may be exempted by the debtor. "In more simplistic terms, this requirement means that the property to be turned over must be estate property." In re Mobley, 2012 Bankr. LEXIS 5658, *5 (Bankr. N.D. Ohio Dec. 6, 2012)[4] (emphasis added); see also In re Richard Osterwalder, 407 B.R. 291, 294 (Bankr. N.D. Ohio 2008) ("Thus, although not specifically stated in § 542, fundamental to the concept of 'Turnover' is that the asset to be turned over must be property of the debtor's bankruptcy estate."). Similarly, Section 542(b) provides that, subject to the exceptions in § 542(c) and (d) and to offset under § 553, "an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee." 11 U.S.C. § 542(b) (emphasis added). When properly invoked, turnover "is simply an effort to recover property – or on property – that is already property of the estate." In re Soundview Elite Ltd., supra, 543 B.R. at 97 (emphases in original).

B. Disputed Contractual Debts, Like The Final Payment, Are Not Property Of The Estate.

Turnover under Section 542 "is a remedy available to debtors to obtain what is acknowledged to be property of the bankruptcy estate." Asousa P'ship v. Pinnacle Foods, Inc. (In re Asousa P'ship), 264 B.R. 376, 384 (Bankr. E.D. Penn 2001) (citations omitted). But, that is not what FES is doing here. As set forth above, Bluestone vehemently disputes that it owes

[4] Pursuant to Local Rule 9013-2(d), all cited opinions available only through an electronic retrieval process are collectively attached as Exhibit 7.

FES any money pursuant to the Coal Purchase Agreement. Therefore, FES is not actually seeking property acknowledged to be estate property but is instead seeking turnover of funds involving a disputed contractual debt.

It is well settled that "where the amount to be turned over is subject to dispute, an action for turnover is improper." VML Co., LLC v. Meguir's Inc. (In re VML Co., LLC), 2017 Bankr. LEXIS 4625, *33 (Bankr. W.D. Tenn Mar. 10, 2017); see also In re Mobley, supra, at **8-9 ("[A]n action brought under § 542 for turnover cannot be used as a method to determine disputed rights of parties to property; rather, turnover is a limited remedy for a trustee to obtain what is acknowledged to be property of the bankruptcy estate."). Turnover "is not a remedy available to recover claimed debts which remain unliquidated and/or in dispute." In re Hechinger Inv. Co. of Del., Inc., 282 B.R. 149, 162 (Bankr. D. Del. 2002) (collecting cases); see also In re Asousa P'ship, supra, 264 B.R. at 384 ("[Turnover under § 542] cannot be used to determine the rights of parties in legitimate contract disputes.").

As the Court in In re Soundview Elite Ltd., supra, explained:

> The turnover power can be improperly invoked, especially when it is used as a Trojan Horse for bringing garden variety contract claims; when the property in question is not already the property of the estate; or when the turnover statute is used to recover assets with disputed title when the estate's claim of ownership is legitimately debatable. It is well established that the turnover power may not be used for such purposes.

Id. at 97 (emphases added).

Here, FES is not seeking to recover property that undisputedly belongs to the estate but rather property owed to FES as a result of Bluestone's alleged breach of contract. Indeed, as Count II of FES's Complaint makes clear, this is nothing more than a simple breach of contract claim. FES alleges the existence of the parties' Coal Purchase Agreement and further alleges that Bluestone has failed to comply with the terms of the Agreement by failing to make the Final

Payment. This is a properly stated breach of contract claim. See Complaint, Count II. While Bluestone disputes that claim and denies any liability, it has not sought to dismiss that Count. However, until FES can establish all the elements of its breach claim, it is not entitled to obtain, in advance, its purported damages for an alleged breach of contract simply by recasting its breach claim as one for turnover. See In re VML Co., LLC, supra, at *33 ("It is settled law that the debtor cannot use the turnover provisions to liquidate contract disputes or otherwise demand assets whose title is in dispute.").

Further, "[u]nlike the entitlement to payment on an account receivable or a promissory note, which is simply to be converted into cash," FES does not yet own the Final Payment, "and its entitlement here is not yet equivalent to recovery of a fixed sum, or tantamount to substituting one kind of asset for another." In re Soundview Elite Ltd., supra, 543 B.R. at 97-98. To the extent that FES alleges that Bluestone has acknowledged that the Final Payment is FES's property or that (in the alternative) the Final Payment is a matured debt, payable on demand, and owed to the estate (see Complaint at ¶26), such allegations are pure legal conclusions that are controverted and which the Court need not accept as true. See In re Reg'l Diagnostics, LLC, supra, at 27. Regardless, the plain language of § 542(b) "creates a strong textual inference that an action should be regarded as a turnover only when there is no legitimate dispute over what is owed the debtor." In re VML Co., LLC, supra, at *33 (citation omitted). In light of the plain dispute over both liability and damages, FES's turnover claim (Count I) cannot succeed as a matter of law and should therefore be dismissed with prejudice.

CONCLUSION

In sum, even accepting FES's factual allegations as true, FES can prove no set of facts that the Final Payment constitutes property of the estate. Because the Final Payment is disputed

and is not property of the estate, FES's claim for turnover must be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Memorandum In Support Of Defendant's Motion To Dismiss Count I Of The Adversary Complaint was served on this the 28th day of January, 2019, electronically in accordance with the method established under this Court's CM/ECF Administrative Procedures and applicable Standing Order(s), if any, upon the following:

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